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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 783

ROGER L. ANDERSON, ET AL.,

Appellants

vs

CITY OF CEDAR RAPIDS,

Appellee

STATEMENT AS TO JURISDICTION

APPEAL FROM THE SUPREME COURT
OF THE STATE OF IOWA

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SUBJECT INDEX

	Page
Opinions Below	1
Jurisdictional Statement	2
Statutes Involved	2
Question Presented	3
Statement of Case	3
The Question Is Substantial	4
Conclusion	9
Appendix "A"—Opinions of Supreme Court of Iowa	11
Appendix "B":	
Sec. 362.27, Code of Iowa 1954	23
Sec. 362.26, Code of Iowa 1954	23
Appendix "C"—Judgment of the District Court for Linn County, State of Iowa	25

AUTHORITIES CITED

CASES

	Page
Brown v. Board of Education of Topeka, 347 U.S. 483	6
Covey v. Town of Somers, 351 U.S. 141	2, 9
Lambert v. People of California, 355 U.S. 225	2, 5, 9
Mullane v. Central Hanover B. & T. Co., 339 U.S. 306	2, 4, 6, 9
New York v. New York, N. H. & H. R. Co., 344 U.S. 293	2, 4, 9
Walker v. City of Hutchinson, 352 U.S. 112	2, 4, 8, 9
Wisconsin Elec. Power Co. v. City of Milwaukee, 352 U.S. 948	4, 8, 9

STATUTES

United States Code, Title 28, Sec. 1257(2)	2, 6
Code of Iowa 1954, Sec. 362.26	2, 3, 4, 5, 8
Code of Iowa 1954, Sec. 362.27	2, 3, 4, 5
Iowa Rules of Civil Procedure, Rule 65	3

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STATEMENT AS TO JURISDICTION

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In compliance with Rule 15 of the Revised Rules of the Supreme Court of the United States, appellants submit herewith their statement and brief on which the Supreme Court has jurisdiction upon appeal to review the judgment of the District Court for Linn County, Iowa, and which was affirmed by the Supreme Court of the State of Iowa entered in this cause.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Iowa in this cause is reported in 249 Iowa ....., 93 N.W.2d 216; a copy of this opinion is attached hereto as Appendix "A." The judgment of the District Court for Linn County, State of Iowa, is attached hereto as Appendix "C."

JURISDICTION

Appellants' action seeks to have certain sections of the Statutes of the State of Iowa providing for notice by publication be declared unconstitutional and the judicial proceedings for annexation of their property commenced pursuant thereto be declared null and void.

The decision of the Supreme Court of Iowa affirming the decree of the District Court for Linn County was entered November 18, 1958, and on January 16, 1959, the Supreme Court of Iowa denied the appellants' petition for re-hearing which had been filed within the time allowed by Rule 350 of the Rules of Civil Procedure of Iowa. The notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of Iowa on January 22, 1959.

The jurisdiction of the Supreme Court to review the decision by direct appeal is conferred by Title 28, *United States Code*, Section 1257(2). The following cases sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Mullane v. Central Hanover B. & T. Co., 339 U.S. 306.

New York v. New York, N. H. & H. R. Co., 344 U.S. 293.

Covey v. Town of Somers, 351 U.S. 141.

Walker v. City of Hutchinson, 352 U.S. 112.

Wisconsin Elec. Power Co. v. City of Milwaukee, 352 U.S. 948.

Lambert v. People of California, 355 U.S. 225.

STATUTES INVOLVED

Section 362.26 and Section 362.27, *Code of Iowa 1954*, are set forth in Appendix "B" attached hereto.

QUESTIONS PRESENTED

1. Whether Section 362.27, *Code of Iowa 1954*, which provides for notice, by publication only, to landowners, of court proceedings instituted by a Municipal Corporation to secure annexation of their property is sufficient to meet the requirements of the due process clause of the 14th Amendment of the Constitution of the United States, Section 1, where the interests, names and addresses of the property owners affected by such court proceedings were known by, in possession of, and readily available to said city.

2. Whether purchasers of real estate under contracts duly recorded are entitled to any notice of court proceedings instituted to annex their property as a guarantee of their right to due process under the 14th Amendment to the Constitution of the United States, Section 1.

STATEMENT

Appellants own property sought to be annexed by the appellee, the municipality of Cedar Rapids, Iowa. Section 362.26, *Code of Iowa 1954*, requires that after resolution of the city council and a majority vote of only the residents of the city, the city shall commence proceedings in equity against the owners of the property proposed to be annexed and list in its petition all owners as shown by the platbooks. The appellee commenced proceedings in equity for the annexation of the appellants' property and purported to give appellants notice of the proceedings by publication in the Cedar Rapids Gazette, which notices were published pursuant to Section 362.27 of the *1954 Code of Iowa*. On March 12, 1958, the appellants filed a special appearance pursuant to Rule 66 of *Iowa Rules of Civil Procedure*, challenging the jurisdiction of the Court on the ground that the purported service of notice given by publication only pursuant to Sec-

tion 362.27, *Code of Iowa 1954*, was insufficient for the reason that said Section 362.27 is unconstitutional in that it violates the due process requirements of the 14th Amendment of the *Constitution of the United States*, Section 1 (R. pp. 158-162). The trial court ruled that published notice was sufficient and on appeal the Supreme Court of Iowa affirmed the ruling (*City of Cedar Rapids v. Cox*, 249 Iowa ....., 93 N.W.2d 216), and held that the appellants were not denied constitutional guarantees of due process and that Section 362.27, *Iowa Code 1954*, was constitutional (R. pp. 219-233). These rulings were predicated on cases where the manner of notice was not in question and the annexation did not involve judicial proceedings but merely city council proceedings. Section 362.26 prescribes judicial proceedings and decree of court and the issue therefore is the landowners' opportunity to be heard in court when his property rights are affected. Copies of the rulings of the District Court of Linn County and the Supreme Court of Iowa are appended hereto (Appendices "C" and "A").

THE QUESTION IS SUBSTANTIAL

The issue involved in this appeal is similar to that raised in *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306; *New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293; *Walker v. City of Hutchinson*, 352 U.S. 112; and *Wisconsin Elec. Power Co. v. City of Milwaukee*, 352 U.S. 948, relating to the insufficiency of notice by publication and is of importance to all property owners and all cities and towns. In those cases the Court held that notice by publication can now only be justified where necessary. In *New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293, the Court said:

> "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. (Citing the Mullane case.) * * * The statutory command for no-

> tice embodies a basic principal of justice—that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights."

The most recent pronouncement of the Court with regard to notice was in *Lambert v. People of California*, 355 U.S. 225, at p. 228, where Mr. Justice Douglas said:

> "Engrained in our concept of Due Process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. Recent cases illustrating the point are Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865; Covey v. Town of Somers, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021; Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed. 2d 178."

The case at bar is an annexation proceeding. Section 362.26, *Iowa Code 1954*, prescribes the procedure which must be followed. The statute requires that after resolution of the city council and vote of only those residents of the city, the city shall cause to be filed in district court a suit in equity against the owners of the property to be annexed. Among other things, the petition in such action must contain a description of the property proposed to be annexed and a list of each property owner therein as shown by the plat books in the office of the county auditor. By thus requiring the city to inspect the records and ascertain the names of owners all doubt is removed as to the city's knowledge of the location and identity of the landowners of the property proposed for annexation. Pursuant to *Iowa Code 1954*, Section 362.27, notice of the proceedings was published in the Cedar Rapids Gazette. The Supreme Court of Iowa held that this statute

was constitutional, thus bringing this appeal within Title 28, *United States Code*, Sec. 1257(2).

No necessity exists which justifies notice by publication in the instant case. When a landowner's rights with respect to his property are to be adjudicated against him he is entitled to notice and an opportunity to be heard. As stated by Mr. Justice Jackson in *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306, at p. 314:

> "The fundamental requisite of due process of law is the opportunity to be heard."

Necessity is not shown by the fact that the Legislature has authorized notice by publication of annexation proceedings. The same argument was rejected by the Court in *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306, 94 L.Ed. 865. The courts, not the Legislature, determine whether an act is constitutional.

Nor is necessity shown by the fact that earlier authorities may have recognized notice by publication as sufficient in annexation proceedings. Law is a thing of growth which must never be blind to present day conditions. This was stated by the Court in *Brown v. Board of Education of Topeka*, 347 U.S. 483, as follows (pp. 492-493):

> "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."

The Court also considered present day conditions in *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306, where it was stated (pp. 319-320):

"In some situations the law requires greater precautions in its proceedings than the business world accepts for its own purposes. In few, if any, will it be satisfied with less. Certainly it is instructive, in determining the reasonableness of the impersonal broadcast notification here used, to ask whether it would satisfy a prudent man of business, counting his pennies but finding it in his interest to convey information to many persons whose names and addresses are in his files. We are not satisfied that it would. Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests. We have before indicated in reference to notice by publication that, 'Great caution should be secured only by a pretty close adhesion to fact.' McDonald v. Mabee, 243 U.S. 90, 61 L.Ed. 609, 37 S.Ct. 343, L.R.A. 1917 Fed. 458."

The above most certainly applies to a property owner in annexation proceedings as it does to an investor, a city or a property owner involved with a special assessment. Annexations are very infrequent and the nature of annexation is such that it changes the whole legal concept of the purposes for which a landowner may use his property. Annexation in Iowa changes property classifications from rural to city property. Property classified as rural may be used for any legitimate purpose. Property classified as urban property is greatly limited in its use. An example of this restriction and its result is the livestock farmer who, after annexation would be in violation of a city ordinance prohibiting the keeping of livestock, and because of such violation would be subject to fine or imprisonment. He is entitled to notice of this circumstance.

Annexation involves the disturbance and loss of many property interests and rights. In addition to the above, some of these are (1) zoning which involves building restrictions

as to types of structure, restrictions as to use and restrictions as to minimum area requirements (2) restriction on the expansion of non-conforming uses of property (3) forced abandonment of private water and sewer systems, (4) assessment for streets and other public improvements.

Also involved is the subjection of the land to taxes and government in which the landowner had no voice in formulating.

In addition to the property interests and rights that are effected in this case, the landowners in this case have been denied the fundamental right to be heard. The Legislature of Iowa provided in Section 362.26, *Code of Iowa 1954* (see Appendix "B"), that no annexation could be had until the owners were allowed a hearing in Court to present their defenses. If they are not given reasonable notice of this proceeding, they will be denied their right to be heard and present their legal defenses. To allow a city to give notice by publication where it could give notice by mail, is to permit fiction to replace the truth and darkness the light. It is the same as practically no notice at all in this day. Mr. Justice Holmes said in *Hyde v. United States*, 225 U.S. 347, 390:

"The Constitution is not to be satisfied with a fiction."

In the case of *Walker v. City of Hutchinson*, supra, the United States Supreme Court held that condemnation of property was not valid where conducted under published notice and the name and address of the owner was known. In the case of *Wisconsin Electric Power Co. v. City of Milwaukee*, supra, the United States Supreme Court in a per curiam opinion, without hearing arguments, held that published notice of a special assessment against property did not meet the requirements of due process. It is submitted that if the requirements of due process are to be applied to legislative proceedings such as taxation, it should certainly apply in

the case of court proceedings involving annexation of property.

CONCLUSION

It is submitted that the question presented by the appeal is substantial and is of public importance in view of the fact that the Supreme Court of Iowa has upheld notice of judicial proceedings involving property rights by publication alone where the interests, names and addresses of those landowners whose property was to be annexed were at all times known by, in possession of, and readily available to the appellee city and where no necessity has been shown to justify such notice by publication all contrary to the holding of the Supreme Court of the United States in *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306; *New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293; *Covey v. Town of Somers*, 351 U.S. 141; *Walker v. City of Hutchinson*, 352 U.S. 112; *Wisconsin Elec. Power Co. v. City of Milwaukee*, 352 U.S. 948, and *Lambert v. People of California*, 355 U.S. 225. Because of the importance of this question the appellants respectfully submit that for proper resolution of it the Court should note jurisdiction and order briefs and oral argument.

Respectfully submitted,

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APPENDIX "A"

Opinion of the Supreme Court of the State of Iowa

Opinion dated November 18, 1958

STATE OF IOWA — IN SUPREME COURT

NOVEMBER TERM, 1958

No. 159

CITY OF CEDAR RAPIDS,

Appellant,

vs.

ANN COX, ET AL., Defendants,

ROGER L. ANDERSON, ET AL.,

Respondents.

Appeal from Linn District Court—John W. Tobin, Judge

Suit in equity pursuant to Section 362.26, 4, Code, 1954, for a decree annexing about 13 square miles of unincorporated adjacent territory to the City of Cedar Rapids. Certain defendants have appealed from an adverse ruling deemed a final adjudication under Rule 86, Rules of Civil Procedure. Plaintiff was granted an appeal, consolidated with defendants' appeal, from an adverse interlocutory ruling.—Affirmed on both appeals.

Ernest F. Pence, Wm. W. Crissman, James E. Bromwell, and O. W. Lawrence, all of Cedar Rapids, for appellants Roger L. Anderson, et al.

C. W. Garberson and W. M. Dallas, both of Cedar Rapids, for appellee and cross-appellant City of Cedar Rapids.

Plaintiff, City of Cedar Rapids, filed its petition in equity in the District Court pursuant to Section 362.26. 4, Code,

1954, for a decree annexing about 13 square miles of unincorporated adjacent territory to the city. About 100 defendants, Roger L. Anderson, et al., filed special appearance alleging they were not served with sufficient original notice of the suit in that it was served by publication pursuant to Code, Section 362.27, and this statute is unconsitutional as a denial of due process guaranteed by the 14th amendment to the federal constitution and Article I, Section 9, Iowa Constitution.

Section 362.27 provides notice of filing a petition asking a decree of annexation shall be served by publication once a week for three consecutive weeks in a newspaper of general circulation. (See also Sections 618.3, 618.14.) In accordance with the statute notice was published in the Cedar Rapids Gazette, the city's daily newspaper.

Rule 60.1, Rules of Civil Procedure, provides that where service of original notice is made upon a known defendant copy of the notice shall also be sent him by ordinary mail unless affidavit is filed stating no mailing address is known and diligent search has been made to ascertain it. The parties do not agree as to whether the record properly shows compliance with Rule 60.1 as to these defendants-appellants who are among 537 persons made parties, as hereinafter explained, subsequent to commencement of the action to which there were originally about 1,500 defendants. Proof of mailing notice to defendants Roger L. Anderson, et al., was not filed until after they took their appeal to this Court.

We find it unnecessary to decide whether there was compliance with Rule 60.1 as to these defendants-appellants. Indeed we may assume there was not such compliance. The record does show, however, that proof of mailing notice to all but 18 of the approximately 1,500 original defendants was filed long before the filing of appellants' special appearance.

The trial court overruled defendants' special appearance. It also overruled their motion to dismiss. These defendants then filed their election to stand on the record theretofore made and appealed to us. See Rule 86, R.C.P. They first assign as error the ruling on the special appearance.

I. The question presented is whether Section 362.27, providing for notice of such an action as this by publication once a week for three consecutive weeks in a newspaper of general circulation, violates the due process requirements of the federal and state constitutions. We affirm the trial court's negative answer to this question.

Defendants' main reliance is upon the decision in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, where a New York statute providing for notice by publication to beneficiaries of a common trust fund of a trust company's petition for settlement of its accounts is held to violate due process as to beneficiaries whose whereabouts are known. Some other precedents which follow the Mullane case are also relied upon. We think the Mullane decision is not applicable here.

We have held failure to provide for any notice and hearing on the question of annexation of territory to a municipality does not deprive owners of their property without due process of law. Wertz v. City of Ottumwa, 201 Iowa 947, 950-4, 208 N.W. 511. We said (page 952 of 201 Iowa) the case was somewhat analogous to those where boundaries of school corporations may be changed by action of the boards of directors. See Peterson v. Swan, 231 Iowa 745, 752-3, 2 N.W.2d 70, 74, which quotes from the Wertz opinion. An early case Morford v. Unger, 8 Iowa 82, 88-9, holds the power of the Legislature to create or enlarge boundaries of municipalities does not depend upon consent of the inhabitants. City of Tucson v. Garrett, 77 Ariz. 73, 267 P.2d 717, 719, holds notice or consent are unnecessary.

The Iowa precedents just cited are approved in City of Des Moines v. Lampart, 248 Iowa 1032, 1036, 82 N.W.2d 720, 722.

If, as we have held, extension of municipal boundaries without assent of or any notice to the inhabitants is not a denial of due process, certainly annexation upon published notice does not have that result.

Our prior decisions are in harmony with Hunter v. City of Pittsburgh, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151, which holds the state may authorize the extension of the territorial area of a municipal corporation with or without the consent

of the citizens or even against their protest, unrestrained by any provision of the federal constitution. The opinion states (page 179 of 207 U.S., page 159 of 52 L. Ed.):

> "Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, * * * in the unaltered or continued existence of the corporation or its powers, and there is nothing in the federal constitution which protects them from these injurious consequences." See also Seward County R.F.P. Dist. v. Seward County, 156 Neb. 516, 56 N.W.2d 700, 705-6; Anno. 64 A.L.R. 1335, 1358-60.

We think there is another consideration upon which the Mullane decision is not controlling here. There the only notice was the statutory published notice which was not reasonably calculated, under the circumstances, to reach the parties in interest. The Mullane opinion observes (page 319 of 339 U.S., page 876 of 94 L. Ed.):

> "Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all since any objection sustained would inure to the benefit of all. * * *
>
> "The statutory notice to known beneficiaries is inadequate not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand."

Here, as previously indicated, it appears that all but 18 of the approximately 1,500 original defendants were given notice by mail pursuant to Rule 60.1. Further, the filing of the petition in court was preceded by other published notices, by proceedings of the city council and by a city-wide election on the proposition of annexing the whole territory to the city.

There was first introduced before the council a proposed resolution to annex about two square miles of the territory in question. Notice was given by two publications in the Cedar Rapids Gazette of the time and place of considering this resolution. Five days after this hearing a second pro-

posed resolution was introduced for the annexation of the remaining, approximately 11 square miles of territory in question. Like notice was published of the time and place of considering this resolution. Notice of the election was given by publication once a week for three consecutive weeks in the Gazette. (See Code, Section 362.26.) Filing of the petition in Court followed the election.

It is true neither of the notices of the proposed resolutions just referred to described the whole 13 square miles of area now sought to be annexed. One notice described the two square miles and the other the remaining 11 square miles. Notice of the election, however, referred to the entire territory.

We think it may not fairly be said that notice by publication upon defendants-appellants of the filing of the petition in court, following as it did notice by mail to nearly all the 1,500 original defendants, three other published notices and a city-wide election, was not reasonably calculated to reach nearly all the parties in interest. Incidentally we may observe it is reasonable to conclude that wide publicity, through the news columns, radio, television and by word of mouth, attended the proposal to annex such a large area to a city like Cedar Rapids.

To uphold the contention of appellants now considered might put in jeopardy numerous decrees of annexation on notice by publication. Obviously we should not reach a decision of such far-reaching implications unless the right thereto is clear. See In re Estate of Pierce, 245 Iowa 22, 28, 60 N.W.2d 894, 898.

We hold defendants-appellants were not denied constitutional guarantees of due process in the matter of notice of the filing of the petition in court.

II. One ground of defendants' motion to dismiss asserts plaintiff commenced two separate annexation proceedings and combined them into one proceeding for purposes of the popular election and trial to the Court, such merger of proceedings does not conform to the requirements of Section 362.26, 1 and 2, the proceedings are therefore void. Overruling this ground of the motion is the second assigned error.

As previously explained, it was first proposed to annex about two square miles and five days after the hearing on such proposal it was proposed to annex the remaining 11 square miles here involved. The two tracts are contiguous. Statutory notice of the hearing on each proposal was given and each hearing was held. At an adjourned meeting of the day the second hearing was held (October 6) it was ordered an election be held on the annexation of the entire 13 square miles.

Defendants contend they were entitled to notice of a hearing before the council of a proposal to annex by one act the entire area and they never had an opportunity to present to the council objections to such an annexation.

We are not inclined to reverse the trial court's ruling on this ground. Each owner was given notice of a hearing on a proposal to annex to the city his property, together with the rest of the area described in the notice. Defendants' complaint is that they were not given notice of a hearing on a proposal to annex the property described in the notice, which included their property, as part of a larger area which included both tracts. In other words defendants say they had no opportunity to object to the inclusion in the city of their property *along with other property.*

After hearing all objections to the annexation of the two tracts embracing the whole area the council decided it should all be annexed. If the council had decided that each tract should be annexed clearly defendants would have no ground of complaint. The council's decision that the whole area consisting of the two tracts should be annexed had the same practical effect. Voters of the city voted in favor of this annexation. Defendants do not suggest any respect in which they were prejudiced by the council's determination to annex the two tracts as one area rather than separately. No such prejudice occurs to us.

Our latest annexation decision, Incorporated Town of Windsor Heights v. Colby, 249 Iowa ..., 89 N.W.2d 157, 159-60, says:

> "(2)II. It has been the holding of various courts the failure to literally comply with every word of the statutory directions is not fatal to an annexation proceed-

ing. (Citation.) It has also been held substantial compliance with statutes relating to annexation is sufficient and is not grounds for holding the proceedings invalid. (Citations.)"

The opinion just cited goes on to hold that our precedents to the effect school reorganization statutes should be liberally construed may well be applied to cases involving annexation of territory to cities. We quote an excerpt from one such precedent which includes this (page 160 of 89 N.W.2d):

> "The courts very properly * * * go to the limit of liberality in giving effect to the voice of a majority wherever it can reasonably be done without violence to the manifest spirit and intent of the Legislature."

Under Section 362.26 proposals to annex unincorporated territory to a city originate with the city council and not, as in some states, with inhabitants of the territory to be annexed. Thus it is the council which fixes the boundaries of the territory it is proposed to annex. Initiation of the proceedings by the two resolutions, rather than by a single one, where, as here, the two tracts are contiguous, the resolutions are introduced before the council at about the same time and the election is upon a proposal to annex the entire area, does not seem to be a substantial departure from the essential requirements of the statute.

Precedents cited by each side on this branch of the case have been carefully considered. None of them seems to be closely in point and we do not discuss them.

III. The trial court ordered separate trial, pursuant to Rule 186, R.C.P., on the issue whether there were indispensable parties not made defendants. Following this trial the Court held there were eight owners of property in the territory to be annexed, as shown by the platbooks in the office of the county auditor, who were not made defendants. Also that all purchasers of property under contracts of record and assignees thereof, although not shown by the auditor's platbooks, must be made parties. Plaintiff was given 60 days to join as defendants the parties referred to.

One ground of the motion to dismiss of defendants-appellants asserts the above adjudication was final on the issue decided and therefore the action should have been dismissed.

Overruling this ground of the motion is the remaining assigned error. It is argued that having held there were indispensable parties not made defendants the Court was compelled to dismiss the action and could not order them brought in.

The argument is without merit. The trial court proceeded strictly in accord with Rule 25(c), R.C.P., which states, "If an indispensable party is not before the court, it shall order him brought in." This provision is mandatory. That the order was made in a final adjudication on a portion of the issues did not require a dismissal of the action. See in this connection Tod v. Crisman, 123 Iowa 693, 99 N.W. 686; Whitmer v. Board of Directors, 210 Iowa 239, 230 N.W. 413; Haas v. Contest Court, 221 Iowa 150, 161, 265 N.W. 373; Gunnar v. Town of Montezuma, 228 Iowa 581, 585-6, 293 N.W. 1; Nissen v. Nissen Trampoline Co., 241 Iowa 474, 485, 39 N.W.2d 92, 98; 67 C.J.S., Parties, Section 129.

Except for the Nissen case the decisions just cited involve Section 10981, Codes 1924 to 1939, the last clause of which is substantially the same as the first sentence of Rule 25(c), quoted above. Referring to this provision, Haas v. Contest Court, supra, states at page 161 of 221 Iowa:

> "* * * under the last section above quoted, the remedy, if there were not proper parties, would not be to dismiss the action for want of proper parties, but to ask the court to make an order bringing in such parties as it is claimed are necessary; and, where such situation exists, the court still has jurisdiction of the parties before it. * * *."

It is well settled in this state that lack of indispensable parties may be raised for the first time upon appeal from the judgment. Where the point is well taken the cause is not dismissed but remanded to the trial court for the purpose of bringing in the party or parties found to be indispensable. See Tod v. Crisman, supra, and other precedents cited last above.

We are not to be understood as approving the holding that all purchasers of property under contracts of records and assignees thereof, although not shown by the auditor's platbooks, are indispensable parties.

IV. We consider now plaintiff's appeal from a ruling made July 10, 1958, that this is not a class action within the meaning or Rules 42, et seq., R.C.P.

As explained in Division III hereof the trial court heard and adjudicated certain issues. Its judgment on these issues, filed November 4, 1957, required plaintiff to join as defendants eight owners of property in the area in question, as shown by the platbooks in the office of the county auditor, and also all purchasers of property under contracts of record, or assignees thereof, whether or not shown by such platbooks. This judgment also held this is not a class action. Plaintiff complied with this judgment by joining as defendants 537 additional parties.

On July 2, 1958, plaintiff filed a motion asking the Court to determine under Rule 46, R.C.P., that the parties now before the Court adequately represent the class of persons described in Code, Section 362.26, as "the owners of the property proposed to be annexed." On July 10 the Court reaffirmed its judgment of November 10, 1957, that this is not a class action but if it should be determined upon appeal to be one "then the parties now before the court adequately represent the class." It is from this ruling of July 10 we granted plaintiff this appeal.

Plaintiff assigns as error the holding that all owners of property within the area proposed to be annexed are indispensable parties, and if the trial court was correct in such holding, the ruling that plaintiff could not prosecute this suit as a class action under Rule 42, R.C.P.

At best it is very doubtful plaintiff is now entitled to urge either claim of error. The judgment as to who are indispensable parties and that this is not a class action was, as stated, entered in November, 1957. Plaintiff made no attempt to appeal from this judgment but, in effect, sought a reconsideration of it, at least the holding it was not a class action, by its motion of July 2, 1958 That no appeal will ordinarily lie from a decision on a motion to reconsider or set aside a previous ruling see Stover v. Central Broadcasting Co., 247 Iowa 1325, 1331-2, 78 N.W.2d 1, 5, and citations. The error, if any, was in the judgment of November 4.

Plaintiff not only made no attempt to appeal from this judgment but complied therewith by bringing in the addi-

tional parties as the Court required. Such compliance is ordinarily deemed a waiver of the right to appeal from the judgment. Bruner v. Myers, 203 Iowa 570, 571-2, 213 N.W. 217, and citations; Eggleston v. Town of Aurora, 233 Iowa 559, 562, 10 N.W.2d 104, 105. See also Sergeant v. Watson Bros. Transp. Co., 244 Iowa 185, 200-1, 51 N.W.2d 86, 95, and citations.

Notwithstanding the above, as we did in Stover v. Central Broadcasting Co., supra, and many other precedents, we will state our views upon plaintiff's two complaints. It is not clear plaintiff complains of the holding the owners of the property sought to be annexed, as shown by the platbooks in the office of the county auditor, must be made parties. At least its principal complaint seems to be against the holding that purchasers under contracts of record and assignees thereof, whether or not shown by the auditor's platbooks, must be made defendants. We think the trial court was correct as to owners as shown by the platbooks but it was error to require contract purchasers, not shown as owners on the platbooks, to be made defendants.

Section 362.26 provides:

> "* * * 4. * * * the council shall cause to be filed * * * a suit in equity against the owners of the property proposed to be annexed, * * *. 5. The petition shall contain: a. A description of the perimeter of the entire property proposed to be annexed and a list of each property owner therein as shown by the platbooks in the office of the county auditor."

Clearly the suit must be filed "against the owners of the property proposed to be annexed." The question is who are included within this term. We think the word "owners" in subsection 4 may fairly be construed to mean each owner of property to be annexed, as shown by the auditor's platbooks, to which subsection 5 refers. That is to say, the words "owners" in 4 and "each property owner * * * as shown by the platbooks" in 5 are used in the same sense. It is certain the petition need contain a list of only such owners as are shown by the platbooks. It is unlikely the list of owners would be thus limited if it were intended that owners not shown by the platbooks must be joined as defendants.

It is true the term "owner" is of quite general application and is frequently applied to one having an interest in or claim upon property less than absolute and unqualified title. City of Dubuque v. Meuser, 239 Iowa 446, 451, 31 N.W.2d 882, 885, and citations. Purchasers under contract are frequently referred to as equitable owners and doubtless merely as owners. Phoenix v. State, ... Ariz. ....., 137 P.2d 783, 146 A.L.R. 1255, 1258-9. But we think the Legislature has not required that they be made defendants to such an action as this unless shown as owners by the auditor's platbooks.

In construing the word "owners" in Subsection 4 of the statute it is, of course, proper to consider other parts of the act, including Subsection 5, which clearly refers to each as shown by the platbooks. We should not consider merely the wording of Subsection 4. City of Nevada v. Slemmons, 244 Iowa 1068, 1071, 59 N.W.2d 793, 794; Board of Park Commissioners v. Marshalltown, 244 Iowa 844, 851, 58 N.W. 2d 394, 398; City of Dubuque v. Meuser, supra, 239 Iowa 446, 452, 31 N.W.2d 882, 886, and citations; 50 Am. Jur., Statutes, Section 352.

"In the absence of anything in the statute clearly indicating an intention to the contrary, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout; and, where its meaning in one instance is clear, this meaning will be attached to it elsewhere. * * *." 82 C.J.S., Statutes, Section 348, pages 728-9. See also Seward County R.F.P. Dist. v. Seward County, supra, 156 Neb. 516, 56 N.W.2d 700, 702.

It is not clear the city contends it was error to hold this suit may not be prosecuted, under Rules 42, et seq., as a class action, against only part of those who own property in the area sought to be annexed, as shown by the auditor's platbooks. Plaintiff apparently made no contention the suit could be prosecuted as a class action at all until about a year after it was commenced. Plaintiff now asserts it has literally complied with the requirement that all persons thus shown as owners be made parties.

In any event we are not persuaded the holding just referred to was an abuse of the trial court's discretion. We should be slow to hold the mandatory requirement of Section 362.26, 4, that the suit be filed "against the owners of

the property proposed to be annexed" may be avoided or circumvented on the theory it is a class action. Of course the auditor's platbooks showed a large number of owners included in the area of 13 square miles. However, as previously explained, Subsection 5 requires the petition to list each such owner. And any inconvenience to which plaintiff was put in naming them all defendants is a thing of the past which could not be avoided by making this a class action.

We are cited to no authorities directly in point on this branch of the case and have found none.

On defendants' appeal the cause is affirmed. We have indicated our disagreement with the trial court's holding in November, 1957, that purchasers under contracts of record and assignees thereof are indispensable parties. However, the only ruling adverse to plaintiff made on July 10, 1958, from which its appeal was granted, is that this is not a class action. This ruling is also affirmed. Two-thirds of the costs in this Court are taxed to defendants-appellants Roger L. Anderson, et al., the remainder to plaintiff city. On both appeals the cause is—Affirmed.

All Justices concur.

APPENDIX "B"

Applicable provisions of the Code of Iowa, 1954

Section 362.27, Code of Iowa, 1954. Publication of annexation proceedings notice.

"362.27. *Notice.* Notice of the filing of the petition shall be served by publication once each week for three consecutive weeks in the manner provided by chapter 618."

Section 362.26, Code of Iowa, 1954. Provisions for annexation procedure.

"362.26. *Annexing territory.* Unincorporated territory adjoining any city or town may be annexed thereto and become a part thereof by proceeding as follows:

"1. The clerk of the municipal corporation, on order of the council, shall cause to be published, once each week for two consecutive weeks in the manner provided by section 618.14, a notice that the council will meet at a certain date, time, and place to consider a proposed resolution for the annexation of certain described territory and to hear objectors and proponents for such annexation.

"2. The council may provide at said meeting or at a subsequent meeting by resolution, adopted at least one month before any regular municipal election, for the annexation of territory described therein.

"3. The proposition shall be submitted to the voters of said city or town at said election in the following form: 'Shall the proposition to annex the territory described as follows: (here set out legal description of the territory); in the resolution adopted by the council of the city (or town) of ....., on the ..... day of ..... be approved?' Notice of the submission of said proposition shall be given by publication once each week for three consecutive weeks in the manner provided by chapter 618.

"4. If the proposition is adopted by a majority of those voting thereon, the council shall cause to be filed in the district court, a suit in equity against

the owners of the property proposed to be annexed, the petition therein setting forth that, under a resolution of the council, the territory therein described was authorized by the voters of said city to be annexed to the city or town.

"5. The petition shall contain:

"a. A description of the perimeter of the entire property proposed to be annexed and a list of each property owner therein as shown by the platbooks in the office of the county auditor.

"b. A statement of facts showing that the municipal corporation is capable of extending into such territory substantial municipal services and benefits not theretofore enjoyed by such territory.

"c. A plat of such territory showing its relation to the corporate limits.

"d. That said annexation is not sought merely for the purpose of increasing the revenues from taxation of such municipal corporation.

"6. If the court finds that there is an affirmative showing that the municipal corporation is capable of extending into such territory substantial municipal services and benefits not theretofore enjoyed by such territory, so that the proposed annexation will not result merely in increasing the revenue from taxation of such municipal corporation; and if the court finds further that all of the proceedings and conditions precedent to annexation as required hereinbefore by subsections 1 through 5, inclusive, have been duly instituted and carried out as provided therein, the court shall decree the annexation. No costs shall be taxed against any defendant who fails to make a defense."

Iowa Rule of Civil Procedure No. 66, relating to special appearances.

"66. *Special appearance.* A defendant may appear specially, for the sole purpose of attacking the jurisdiction of the court, but only before his general appearance. The special appearance shall be in writing, filed with the clerk and shall state the grounds thereof. If his special appearance is erroneously overruled, he may plead to the merits or proceed to trial without waiving such error."

APPENDIX "C"

Judgment of the District Court for Linn County, State of Iowa

STATE OF IOWA

DISTRICT COURT — LINN COUNTY

Case No. 69815

CITY OF CEDAR RAPIDS,

Plaintiff,

vs.

ANN COX, ET AL.,

Defendants.

The Special Appearance of Roger L. Anderson and numerous other newly added defendants having been argued and submitted March 19, 1958, and having been fully considered, the Court makes the following ruling thereon:

I.

A.

The first ground asserted for challenging the Court's jurisdiction is that the provision for service of original notice by publication, as contained in Section 362.27 of 1954 Code of Iowa is unconstitutional in that it violates the 14th Amendment to the Constitution of the United States of America and Article I of Section 9 of the Constitution of the State of Iowa.

The two constitutional provisions are similar. The provision of the Federal Constitution is: "Nor shall any state deprive any person of life, liberty or property without due process of law." The provision of the State Constitution conforms therewith in this language: "No person shall be deprived of life, liberty or property, without due process of law."

The purpose of these provisions is to require that before a Court may enter a judgment adversely affecting those specified rights, the person possessing them must be given

such notice of the pending judicial proceedings that he will be afforded an opportunity to be heard in remonstrance Where such rights exist the Legislature cannot dispense with such notice. A Court cannot enter an effective judgment until such a notice has been given to a person to be affected thereby.

B.

What constitutes due and proper notice has been the subject of a large number of judicial controversies.

To a great degree the nature of the notice required depends upon the nature of the judgment which is sought. Generally stated, prior to 1950, when the action was one asking for a personal judgment, notice had to be given by personal service upon the party, whereas, when the action was in rem, substituted service, as by publication, was sufficient. In the latter class of cases it was undisputed that the type of published notice prescribed by the Code of Iowa is valid and conferred jurisdiction.

In 1950 the United States Supreme Court, in the now famous Mullane case, Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 95 L.Ed. 865, 70 S.Ct. 652, enlarged the field of proceedings in which personal service is required. Prior thereto defendants' contention that substituted service was insufficient in cases such as the case at bar, would not have received as serious attention as it now requires.

Thus, a consideration of the relief sought by plaintiffs, of the extent of any judgment the Court could enter against defendants under the prayer of the petition herein, is essential to a determination of the issue raised by the special appearance. The test is: Is this proceeding of such a nature as to deprive defendants of the rights of liberty and property guaranteed by the constitutional provision for due process?

Section 362.27 merely provides the method of service of notice of the filing of a petition for annexation of additional land by a city. The preceding Section 362.26, prescribes the procedure for annexation, the final step of which is the filing of a petition in equity in the District Court, and a hearing thereon by the Court. Prior to the filing of such petition certain other enumerated proceedings must be had. Upon trial of the cause annexation may be decreed only in the event the Court finds:

(1) That all of the proceedings and conditions precedent to annexation, above mentioned, as enumerated in said Code section has been instituted and carried out.

(2) That there is an affirmative showing that the municipal corporation is capable of extending into the territory, sought to be annexed, substantial municipal services and benefits not theretofore enjoyed by such territory, so that the proposed annexation will not result merely in increasing the revenue from taxation of the City of Cedar Rapids. If the Court so finds, then it shall decree the annexation.

The particular terminology of the statute that the Court "shall decree the annexation" is of no particular significance. It amounts to no more than if the statute had stated "if the Court shall find there is an affirmative showing (etc.) * * * and if the Court further finds that all of the proceedings and conditions (etc.) * * *, the annexation shall be complete and effected." The decisions of the Supreme Court interpreting the present statute make it clear that the function of the District Court is not to make a determination of whether an annexation should or should not be decreed. State ex rel. Mercer v. The Incorporated Town of Crestwood, Iowa , 80 N.W.2d 489. City of Des Moines v. Lampart, Iowa , 82 N.W.2d 720.

The State Legislature vested the District Court only with the jurisdiction to find whether certain facts had been proven and whether other facts had been affirmatively shown. The Court has no discretion as to decreeing the annexation. It has no connection with, nor jurisdiction of, any part of the annexation proceedings, nor the area involved nor the owners of the property except as specified in the statute. None of those limited factors which are the subject of the Court's determination involve any of defendants' rights of life, liberty or property. Defendants have not suggested any rights, of which they would be deprived by the annexation, which have not already been adjudged as not falling within the category of rights contemplated by the constitutional provisions.

The status of an owner of property within an area proposed to be annexed has been definitely established. Titles to real estate were received by individuals from the state, in the first instance, subject to certain restrictions. Among them

are the liability to taxation and to condemnation under the right of eminent domain. Another such reservation was the power retained by the state, for its Legislature to provide for the creation of cities and towns, which power necessarily includes authority providing for the extension of boundaries of a city or town to enable it to bring outside areas into its governmental structure.

The Federal Government has recognized this to be a power belonging exclusively to the state and not subject to federal control. "Municipal corporations are created by the Legislature, and derive all their powers from the source of their creation; and those powers are at all times subject to the control of the Legislature." Rogers v. The City of Burlington, 3 Wal. 654, 18 L.Ed. 79, at 82. "In all these respects the state is supreme and its legislative body, conforming its action to the state constitution, may do as it will, *unrestrained by any provision of the Constitution of the United States.*" (Emphasis supplied.) Hunter v. City of Pittsburgh, 52 L.Ed. 151, 207 U.S. 161.

The power to create corporations for municipal purposes was given to the General Assembly by the Constitution of 1846, Article 8, Section 2. In the early case of Morford v. Unger, 8 Iowa 82, it was held:

> "The right of the legislature * * * is not made to depend upon the consent of the inhabitants, or proprietors of the land on which the proposed city or town is situated."

Inasmuch as the consent of the property owners is not necessary any protest from them would be immaterial and it would seem to follow therefore that no notice to them would be necessary. And this proposition has been directly held in the case of Wertz v. City of Ottumwa, 201 Iowa 947. The statutory provisions for annexation in effect at that time provided that there should be an election and for a hearing in the District Court but no provision was made for any notice to the property owners of any hearing on the question as to the territory to be embraced within the corporation. The statute was attacked on the ground that including the appellants' property within the municipality deprived them of their property, by taxation for municipal purposes, without due process of law. The Supreme Court of Iowa said (page 950):

"Whether any property owners' property shall be included within the municipality is determined solely by the petitioners and the court, without any notice or hearing whatsoever * * * (page 951). We think that a failure to provide for a notice and hearing on the question of annexation does not render the statute unconstitutional * * * (page 952). The statute is not unconstitutional because no notice of the proposed annexation was given to appellants. * * * The basis for appellants further contention that the statute violates the constitution is that, by being brought within the municipality, the property of appellants will ipso facto be subjected to municipal taxes, and that thereby appellants will be deprived of their property without due process of law (page 954). The fact that a property may be subjected to municipal taxes hereafter does not render the statute unconstitutional. Taxes within the municipality must be assessed uniformly. If appellants' property is not subject to tax or special assessment for any particular municipal purpose there is ample provision in the law for review or correction where otherwise securing just and equitable taxation. * * * We think the statute is not unconstitutional."

The ruling in the Wertz case is directly applicable to the present statute, which is so restrictive that the Court has no discretion as to annexation, if the facts are in accordance with the statute. With the Court's function being limited strictly to the matter of fact finding, the giving of notice by publication was adequate. The failure to provide for notice by personal service does not violate the Iowa Constitution guaranteeing due process.

C.

No question involving the due process guarantee of the Constitution of the United States is involved. Concerning the unrestricted power of a state Legislature to provide for the annexation of additional territory to a municipal corporation the Supreme Court of the United States has definitely ruled that the 14th Amendment to the Constitution of the United States has no application, in Hunter v. City of Pittsburgh, supra, at 52 L.Ed. page 159, it said:

> "All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. * * * Altho the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it."

Thus, the rule in the Mullane case has no application to the question now before the Court. Even if the question was governed by the Mullane decision, it does not necessarily follow that personal service should be required in the case at bar. In that case (94 L.Ed., page 873) the Supreme Court of the United States said:

> "Personal services has not in all circumstances been required as indispensable to due process to residents. And it has more often been held unnecessary to non-residents. We disturb none of the established rules on these subjects."

In a subsequent opinion, Walker v. Hutchinson, 1 L.Ed.2d 179, at 182, that Court interpreted the Mullane ruling as applying only to "proceedings which may *directly and adversely* affect their *legally protected interests.*" (Emphasis supplied.)

Certainly a judgment of this court finding the existence of the facts enumerated in the statute would not "directly and adversely affect" the interests of any owner of real estate within the area proposed to be annexed for the reasons (1) that property owners within the area do not have any legally protected interest against their property being annexed by a municipality, and (2) the judgment of the court would not be of such a nature as to directly and adversely affect whatever interests they do have.

For the foregoing reasons the first ground of the Special Appearance must be overruled.

II.

The second ground of the Special Appearance is that an appeal to the Supreme Court of Iowa by plaintiff, from an order entered November 4th, 1957, perfected by a Notice of Appeal filed December 2d, 1957, is still pending and therefore this court does not now have jurisdiction of this cause.

A.

On or about December 30th, 1957, counsel for plaintiff communicated to the undersigned Judge of this court, sitting in chambers, that on December 18th, 1957, the Supreme Court had entered rulings denying certain defendants Application to Appeal from the order of this court entered November 4th, 1957, and also Alternative Application to Appeal from said interlocutory order and sustaining Plaintiff's Motion to Dismiss Appeal of Defendants Eugene E. Kahler, et al, and sustaining Plaintiff's Motion to Dismiss Cross Appeal of Defendants Fred M. Higley, et al. At said time it was further stated that, in view of the foregoing, plaintiff was abandoning its appeal from said order and would comply with said order requiring plaintiff to bring in additional parties defendant, and that consequently a supplemental order should be entered fixing the commencement of the 60-day period within which plaintiff must file its amendment to petition joining new parties.

The undersigned thereupon directed Mr. Garberson, of counsel for plaintiff, to prepare such proposed order and directed him concerning the contents thereof. On January 2, 1958, the undersigned received a letter from Mr. Garberson, dated December 31, stating:

> "Enclosed herewith please find original and eight copies of proposed order which we request be entered to avoid any question as to the period of time within which the plaintiff city may compiy with your order filed November 4, 1957."

Said order was executed by the undersigned January 2, 1958, and duly filed.

On January 31, 1958, plaintiff filed an amendment to petition joining as additional defendants those persons who were specifically named in the order of November 4, 1957, as indispensable parties and also joining a large number of additional defendants which it represented to be all the other

owners of property who were not originally made defendants.

B.

It is a matter of considerable doubt that these newly joined defendants are entitled to raise the question of the filing of notice of appeal at a time prior to their being made parties. But assuming, without conceding, that they can question the court's jurisdiction on that basis, it cannot avail them.

By applying for and obtaining the entry of the order dated January 2, 1958, plaintiff abandoned its appeal to the Supreme Court of Iowa.

Insofar as said order entered November 4, 1957, may have been a final order plaintiff has performed the same by filing its amendment to petition purporting to join as additional defendants those persons which said order adjudged to be indispensable parties and waived its right of appeal. See Bixby v. Blair, 56 Iowa 416. Emery & Co. v. C. B. and Q. R. Co., 186 Iowa 1156. Iowa National Bank v. Roffensperger, 208 Iowa 1133.

Plaintiff could not have proceeded with its appeal thereafter.

The original case was properly in this court when the amendment was filed joining the additional defendants in compliance with the order of November 4, 1957, and the later supplemental order fixing the time limit.

The second ground of the Special Appearance is not a sound basis for objections to the court's jurisdiction.

III.

It is therefore ORDERED, ADJUDGED AND DECREED that said Special Appearance, and each of the grounds thereof separately, is overruled and denied.

Inasmuch as counsel for said special appearing defendants have represented other defendants herein who have filed various motions and answers, and said attorneys are fully familiar with the facts and the law of the case they will be able to prepare and file motions or answers herein within the period fixed by the Rules of Civil Procedure and consequently no additional time need be granted for said purposes. Defendants except.

April 2, 1958.

John W. Tobin
Judge Specially Assigned